85-1317

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. TUCKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Three significant constitutional questions are presented:

I.

Due Process And Public Trial.

Was petitioner, Robert L. Tucker, a Chicago trial lawyer, whom the record shows to have an impeccable general reputation for good character and integrity, deprived of Fifth Amendment due process, and the right to an impartial "public trial," required BY the Sixth Amendment, when:

A. The public prosecutor, prior to and during the trial, secretly, without the knowledge of, or any notice whatsoever to petitioner or his attorneys, submitted to the trial judge in chambers, random, false, derogatory and prejudicial ex parte communications,

including an FBI "informant's report" which falsely accused petitioner of participating in other heinous crimes, including international gun-running and the importation and sale of narcotic drugs -- even though the government acknowledged in its brief on appeal the falsity of the accusations, admitting that the information contained in the "informant's report" was totally uncorroborated?

B. Do the fairness, due process and "public trial" provisions of the Constitution apply to all stages of the trial proceedings, or merely to what the jury is allowed to see, hear, weigh and determine?

II.

Harmless Error Versus Due Process

II. What are the lawful boundaries of the harmless error doctrine?

A. In an admittedly close case, where the defendant's conviction rests solely on the testimony of a single witness whom the court found to be "unreliable," is there any reasonable and principled basis for holding that it was "harmless" to exclude evidence from the jury during its deliberations which directly impeached that "unreliable" witness's credibility?

B. Did the court, in affirming the conviction, fail to apply the "proof beyond a reasonable doubt" standard required in criminal cases under the due process clause, when it held that the evidence was sufficient despite the fact that on the one hand the testimony of the sole incriminating witness against petitioner, one Irving Pheterson, was too unreliable to support a conviction and, on the other hand, but for Pheterson's testimony "the evidence fell far

short of proving Tucker's" guilt (Slip Op., p. 4)?

The Court of Appeals held:

1. That but for the testimony of a single witness, namely Pheterson, who was the principle architect of the fraud charge and who testitifed under a grant of immunity, the evidence "fell far short of proving Tucker's participation in the fraud beyond a reasonable doubt" (Slip Op., p. 4).

2. That Pheterson was "an unreliable witness," "troubled," "evasive," "desperate for immunity and selective and self-justifying in his recollections . . ." (Slip Op., pp. 3, 4, 6), so much so that his testimony, standing alone, would be insufficient to sustain a conviction (Slip Op., p. 4).

3. That the trial court erred in excluding, on the ground

> that it was hearsay, a "weird," "rambling" letter written by Pheterson to the prosecutor which was directly impeaching of Pheterson's credibility, and which perfectly fitted petitioner's theory that Pheterson made up his incriminating testimony against Tucker because he believed he had to do so to obtain immunity."*

The Court, nevertheless, affirmed Tucker's conviction on the theory that there was corroboration of Pheterson's

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*Pheterson's letter to the prosecutor states, inter alia, "You have presented me with a scenario," and goes on to recite his incriminating story (which he is now able to do after a "war" between his "undersoul" and his "oversoul") and closes "everytime I start to writing, I feel that I am not 'saying it right' so I tear up and start over I hope this is what you need. Please advise."

testimony (albeit with evidence which was also consistent with Tucker's innocent role as a lawyer in the transaction) and that the erroneous exclusion of Pheterson's letter was harmless.

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF PROSPECTIVE JURORS

Was Tucker, a black lawyer representing, in this case, a white female client, deprived of his right to a representative impartial jury under the Fifth and Sixth Amendments, when the government used four of its seven peremptory challenges to eliminate all four blacks from the venire, and where the government's "non-racial explanation," for its peremptory challenges was received by the trial judge ex parte and never disclosed to petitioner during the trial, and was subsequently revealed by an expert to be pretextual?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ROBERT L. TUCKER,

Petitioner,

-Vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STAES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, Robert L. Tucker, prays that a writ of certiorari be issued to review he decisions of the United States

Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Two opinions and five separate orders in proceedings below frame the issues raised in this petition.

The opinion of the Court of Appeals for the Seventh Circuit, filed on September 6, 1985, affirming the judgment of conviction fo the U.S. District Court and resolving all issues against the defendants, is reported at 773 F.2d 136 (1985). The Slip Opinion is attached hereto as Appendix B.

A subsequent order of the Court of Appeals, enetered sua sponte, on December 30, 1985, in the case of United States ex rel. Frank Teague v. Michael Lane, et al, No. 84-2474, ordered a rehearing en banc, on the issue of racially motivated peremptory exclusion of black persons from the petit jury that convicted Teague, a black Illinois state court defendant. That order, with a dissenting opinion by Judge Richard D. Cuadhy, is attached hereto as Appendix D.

This petitioner's motion to vacate the Court of Appeals order of December 5, 1985, denying this petitioner's Petition

for Rehearing En Banc and to consolidate this cause with Teague for rehearing en banc on the Sixth Amendment issue, and Court of Appeals order denying that request for rehearing and consolidation, are attached hereto as Appendices E and F.

By summary orders entered by the Court of Appeals on November 7 and 19, 1985, the request of the President of the Cook County Bar Associatin, joined in by the Dean of the Northwestern University School of Law, for leave to file an "Amicus Curaie Statement" in support of the Petition for Rehearing En Banc (Appendix G) and the same unanimous

request of the Board of Managers of the 19,000 member Chicago Bar Association (Appendix H) urging rehearing en banc on the issues raised in this petition for certiorari, were denied by the Appeals Court panel. The motion of the Chicago Bar Association for leave to file such amicus statement is attached hereto as Appendix I.

JURISDICTION

The judgment appealed from was entered by the Court of Appeals for the Seventh Circuit on September 6, 1985. This petitioner's Petition for Rehearing

En Banc, was denied on December 5, 1985, and petitioner's motion to vacate the order of December 5, 1985, and to consolidate this cause with Court of Appeals No. 84-2474, in which rehearing en banc has been ordered, was denied on january 28, 1986.

This Court's jurisdiction is timely invoked within 60 days from the date of the denial of this petitioner's Petition for Rehearing En Banc, pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution

of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

> trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is not a case brought to this Court by a petitioner-lawyer simply bemoaning his conviction in a criminal proceeding. This is a case where a petitioner-lawyer, who happens to be black, desires to call to this Court's

attention, for possible remedy, procedural and substantive due process and equal protection questions which have so contaminated the trial of criminal cases in the Chicago area, and possibly elsewhere, as to have persuaded virtually the entire organized bar in Chicago to request leave to file briefs amicus in the Seventh Circuit, urging the full Court to address these abuses. Leave was denied the Chicago Bar Association and the President of the Cook County Bar Association, joined in by the Dean of the Northwestern University School of Law, to file amicus statements.

Prior to his conviction in this case, petitioner, Robert L. Tucker, had practiced law in the City of Chicago for 27 years. He enjoyed an unblemished and indeed extraordinary reputation for honesty and integrity among lawyers, including prosecutors, judges, civic, business and religious leaders throughout the city. The trial judge, at sentencing, took special note:

> "Mr. Tucker, . . . you could not improve on the testimonials offered during the trial of your case. It is funny, but you and I are of different ages; while I think we both are products of the city, we came up at different times and went to different schools, practiced in different circles, and

yet I was overwhelmed by the coincidence of the people who testified on your behalf; overwhelmed by the coincidence that all of those people -- or at least virtually all of those people -- were friends of mine and if I had been in some trouble and would have had to ask them to say something about me, I would have been flattered if they said the same things about me that they said about you. That could not have been improved upon on any way . . ." (Tr. February 24, 1983, pp. 64-65).

Petitioner was indicted along with two other persons, on nine counts of wire fraud and one count of making a false statement to a federally insured bank. The trial of the case lasted some six weeks, and the facts were quite extensive. In essence, the charges against

this petitioner arose from a complicated transaction for the sale of a large quantity of black beans to the government of Guatemala, in which this petitioner, a member of the bar of the State of Illinois, represented a client, one Debra Bell, an international comodities broker who had already negotiated and signed a contract with Guatemalan authorities for the sale and purchase of the beans.

Petitioner's former client and co-defendant, Debra Bell (Court of Appeals No. 83-1439), has previously docketed her separate petition for a writ of certiorari in this Court.

The fraud charges stem from the fact that in order to obtain and make payment for the beans, forged documents were supplied to Continental Illinois National Bank of Chicago, which held a letter of credit from the National Bank of Guatemala, and paid out to petitioner's client some $5,000,000 in reliance on the documents. There is no dispute that the documents were forged. A third defendant, one Michael Ball, a Miami, Florida, freight forwarder, has sought no relief in this Court from his conviction and four month sentence.

A. Secret, False, Prejudicial Ex Parte Communications To The Judge.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing this petitioner to the custody of the Attorney General for a term of 15 months, was entered on February 24, 1983.

On that day, and not before, petitioner learned from the comments of the trial judge that at some point prior to the opening of the trial on December 6, 1982, the prosecutor, without the knowledge of, and without any notice

whatsoever to the attorneys for petitioner, secretly, submitted to the trial judge in chambers a false, derogatory, and prejudicial written FBI "informant's report" which, among other things, falsely accused this petitioner of having been unlawfully engaged, allegedly with petitioner's client and co-defendant, in the running of guns and other armanents to rebel forces in El Salvador, and further falsely accusing petitioner of being involved, with petitioner's client, in the importation and sale of narcotic drugs.

At the time of the foregoing secret

pre-trial submission to chambers by the prosecutor, the trial court had under advisement, petitioner's pre-trial motions, to inter alia, dismiss the indictment for numerous alleged acts of prosecutorial misconduct, and for a hearing into the competence of the government's sole incriminating witness against this petitioner, based upon that witness' sworn acknowledgement, or claim in prior judicial proceedings of having previously suffered permanent brain damage in a personal injury accident, which in the witness' own words, under oath, impaired his ability to "remember things" and to recall facts.

Petitioner's pre-trial motions were denied by the court, and in its brief on appeal, the government acknowledged the baselessness of the above-described secret pre-trial submissions to the trial judge, admitting that the content of the said FBI "informant's report" was totally uncorroborated.

On May 9, 1984, 16 months after the trial, and six months after petitioner's brief on appeal had been filed, upon the persistent demand and motion of petitioner's appellate counsel (not the same as the attorneys who served on the trial), the trial court entered an order

(see order of the district court, App. A), directing the government to turn over to petitioner and his attorneys by 5:00 p.m., on the date that the order was entered, "a copy of all materials submitted to the court in camera, in connection with the trial of this cause, which materials relate to information provided to the government by or about James Gunnel's," (a government informant); and

> "a list of all additional materials supplied to the court by the government, in camera, in connection with the trial of this cause, which list shall identify the source of the document and describe, in general terms, the subject matter of the submission."

The court ordered access to the documents, information and materials which were the subject of the order of May 9, 1984, to be limited to the defendants and their attorneys.

Thereupon, on May 10, 1984, after briefs had been filed on appeal, petitioner and his attorneys learned for the first time, that in addition to the secret pre-trial submission to chambers by the prosecutor described above, the government also secretly submitted and the trial court received and examined in chambers on the dates indicated below, the following false, derogatory and

prejudicial materials and information; the secret transmittal of which is now fully admitted by the government (see Justice Department letter to counsel for defendants turning over materials, dated May 10, 1984, App. A-1):

> 1. A secret letter to the trial judge, from the prosecutor, dated October 15, 1982, (fifty-one (51) days prior to the opening of the trial) containing a full blown statement of the "government's theory of the case," accompanied by certain grand jury exhibits, and selected transcripts of the grand jury testimony of 10 government witnesses, and expressly inviting the judge's attention to specific pages of the transcript "for evidence specially of Mr. Tucker's (petitioner) involvement."

This secret letter closed with the observation: "If the court has any questions about any exhibits please let me know. . . ."

2. A secret written statement from the prosecutor to the trial jduge dated December 1, 1982 (five (5) days before the opening of the trial), describing to the trial judge an occurrence in the grand jury room, in which a grand juror, who happened to be an employee of the First National Bank of Chicago, interrupted the grand jury proceedings to advise that she knew this petitioner, and had been introduced by this petitioner to another person who was identified as a government witness. This secret submission was made to the trial judge in support of the government's false accusation and "theory" that this petitioner was involved with Guatemalan nationals in "laundering" dirty money, as the

prosecutor would later argue to the jury. The statement from the prosecutor further advised the trial judge that the particular grand juror, having been excused for grand jury service, was to be converted to a government witness, and that "the fact that she sat on the grand jury for a brief time . . . should have no effect on her testimony, and need not be disclosed, in the government's view." The trial judge abided by the prosecutor's advice on both counts. He did indeed allow the First National Bank official to testify on the trial as a government witness (Tr. 2727-2734), and at no time did anyone, including the judge, ever inform the defense that the witness had also served for a time on the grand jury that returned the indictment against this petitioner.

3. An FBI internal report, secretly submitted by the

> prosecutor to the trial judge on December 8, 1982 (while the trial was under way), which falsely advised the trial judge that this petitioner had personally established a "leak" in the grand jury proceedings' "knew everything" that was going on the in grand jury room, and that this petitioner had, according to an unidentified "source," attempted to influence and bribe the key government witness to "change his statement." (Emphasis added).

Most of the above-described secret ex parte submissions were received and examined by the trial judge before the trial commenced. All were received and examined by the trial jduge before the trial was concluded, and prior to the return of the jury's verdict.

B. Impermissible Application Of The Harmless Error Doctrine.

The government's principal witness, and the only witness to incriminate this petitioner, was one Irving Pheterson, a Miami based commodities broker who purportedly owned or controlled the beans through a source in the Far East, and who was clearly the principal architect of the fraud. Pheterson received immunity for his testimony.

Simply stated, the issue as to this petitioner was whether petitioner was acting professionally as a lawyer,

unaware of the foregery, or was an active participant in the fraud.

The answer to that question depended entirely on the testimony and credibility of Pheterson whom, as the record shows, prior to September 3, 1980, in his law office, this petitioner had never met nor spoken to before in life. The panel expressly found that ". . . apart from Pheterson's testimony the evidence fell far short of proving petitioner's participation in the fraud beyond a reasonable doubt . . . ." (Emphasis added). Further, the panel found, that Pheterson was an "unreliable," "troubled," "evasive"

witness, "desperate for immunity, and selective and self-justifying in his recollections." Indeed, the panel found that Pheterson's testimony was so "unreliable," being for the most part consistent with Tucker's role as simply being a lawyer in the transaction, that a conviction on Pheterson's testimony alone could not stand. Even so, the panel held that other evidence, though not itself sufficient to convict, provided sufficient "corroboration" of Pheterson to permit affirmance. At the same time the panel also ruled that although the trial court had erred in excluding from evidence a

"rambling," "weird" letter written by Pheterson to the prosecutor, in the nature of a proffer of testimony which was highly impeaching of Pheterson's credibility, the error was "harmless."

In that letter, Pheterson stated that the prosecutor had "told me verbally your thoughts (emphasis added) regarding the proffer . . ." and "suggested to me that from your investigation of other people that you have created a possible scenario of events which led you to believe the following" (App. C., p. 1). Pheterson then goes on with a revised description of the "war" between his

"undersoul" and his "oversoul" (App. C., p. 5), and states that the prosecutor, by her vists and conversations has "started an opening" in the process of remembering the information relating to the aforesaid events . . . ." The letter then goes on to recite what became Pheterson's immunity testimony about "Bob Tucker" (petitioner), and states that, "I am extremely relieved that I can now share with you . . . . what you have been pressing for . . . " (emphasis added) (App. C., p. 4).

In "Part 2" of the letter, Pheterson ends by stating, "Every time I start to writing I feel that I am not 'saying it

right' so I tear it up and start over. I hope this is what you need" (App. C., p.8). In short, Pheterson's letter, the exclusion of which the panel expressly found to be error (App. B., p. 6), provided clear and dramatic support for this petitioner's charge that Pheterson's testimony against "Bob Tucker" was manufactured in response to what he, Pheterson, understood was a "scenario" which the prosecutor had developed, and which Pheterson believed he had to adopt in order to obtain immunity.

Pheterson's credibility, or lack of same, being the sole determinant of the

guilt or innocence of petitioner herein, the crucial question presented here is whether, as a matter of fundamental due process, petitioner was entitled to have the jury consider, and examine during their deliberations, the "weird", "rambling", "inconsistent," and "contradictory" two-part Pheterson letter; and whether the panel's holding that its erroneous excluson on the ground that it was hearsay (App. B., p. 6) was harmless, extends the harmless error doctrine beyond the limits imposed by reason and due process.

C. Racially Motivated Peremptory Exclusion Of Prospective Jurors In Federal Criminal Trials.

This Court now has under advisement the question of racially motivated peremptory exclusion of prospective jurors in state court proceedings. Batson v. Kentucky, 105 S. Ct. 2111 (1985). This petition presents the same issue in the special and now peculiar context of a federal criminal proceeding.

The current confusing strain and pull of inter-circuit conflict on this very vital question has now eclipsed and

has become confounded within the ranks of the Court of Appeals for the Seventh Circuit, by the disparate and inconsistent treatment of the exact same issue in two distinct cases, decided by different panels of the Seventh Circuit with respect to rehearing en banc, within 25 days of each other in the month of December, 1985.

This case, under advisement by one panel of the Court of Appeals for the Seventh Circuit for 16 months after oral argument, raised, inter alia, the question of whether the conscious, peremptory striking by the prosectuion of all black

prospective jurors from the jury that convicted this black petitioner violated the Sixth Amendment. The prosecution used four of its seven peremptory challenges to exclude the only four black persons in the venire. No reason was ever communicated to the defendants on trial for the prosecutor's conduct. However, in another ex parte conference with the court in camera, the government explained that it sought to seat an educated jury, with persons who had business experience. A subsequent analysis by petitioner's expert, which is of record on appeal, revealed the government's

purported "non-racial" explanation to the trial judge to be pretextual. No opportunity to challenge the government's secret explanation to the district court was afforded the defendants on the trial. One of the black prospective jurors with a high school education, had successfully operated his own small metal recycling business in the City of Chicago for 25 years. Three of the black venire persons had finished high school.

At the same time, white jurors were seated and served who had not completed high school, and who had no business experience at all. The conviction of

this petitioner was nevertheless affirmed and the prosecution's conduct was found to be lawful by the opinion of the panel on September 6, 1985. Rehearing en banc was denied on December 5, 1985.

In 1984, after this petitioner's case had been docketed on appeal, United States ex rel. Frank Teague a habeas corpus request by an Illinois state court defendant, Seventh Circuit, No. 84-2474, was filed, and raised as its only issue the same Sixth Amendment question of racially motivated exclusion of black prospective jurors from the jury that convicted Teague, also a black defendant.

A majority of the panel in Teague in an opinion written by Judge Richard D. Cudahy, concurred in by Senior Judge John Peck of the Sixth Circuit, sitting by designation, found that the conduct of the prosecutor, despite two benign rationales which denied racial motivation, violated Teague's Sixth Amendment rights. That panel ordered a new trial. One member of the Teague panel, Judge John L. Coffey, who also sat as a member of the panel in this case, dissented. The Teague opinion, before issuance, was circulated to the active judges of the Seventh Circuit pursuant to Seventh Cir-

Circuit Rule 16(e). On December 30, 1985, a majority of the active judges of the Seventh Circuit, sua sponte, ordered a rehearing en banc in Teague.

On january 28, 1986, the Seventh Circuit panel denied this petitioner's Emergency Motion to vacate its order of December 5, 1985, and to consolidate this cause with Teague for rehearing en banc, limited, if necessary, to the single question of the conscious peremptory exclusion of black persons from the trial jury in each case, solely on the basis of their race.

It would seem that fairness, due process and equal protection would have required a different determination by the Court of Appeals. Conceivably, should this Court deny this petitioner's request for a writ of certiorari, and should the Court of Appeals ultimately resolve the racially motivated exclusion of jurors question in favor of the defendant Teague, this petitioner would be left imprisoned, without benefit or protection of the Seventh Circuit's ruling, although this petitioner raised and argued that same Sixth Amendment question first; and while the Teague appeal was still pending.

REASONS FOR GRANTING THE WRIT

I.

SECRET, FALSE, PREJUDICIAL EX PARTE COMMUNICATIONS TO THE TRIAL JUDGE.

It would seem to be beyond question that when a prosecutor consciously and secretly submits false or highly prejudicial information and other materials regarding a defendant in a criminal case to the trial judge in that case, whether the issues are being tried to the bench or before a jury, the defendant's rights to due process of law and an impartial public trial, guaranteed by the Fifth and

Sixth Amendments have been violated. Gregg v. United States, 394 U.S. 489 (1969).

In addition to the rights of the individual defendant on trial, the honor of the judicial system, and public confidence in the fair administration of justice can only be impugned and sorely undermined if the conduct of the prosecutors in this case is to be approved. Holland v. United States, 348 U.S. 121 (19530.

The situation is all the more outrageous, though perhaps not legally distinguishable, when the prosecutor

subsequently conceded that the "charges" of obstruction of justice, international gun-running, smuggling of narcotics and bribing of a government witness were utterly false, and were directed at a defendant-attorney with an extensive and umblemished reputation for honesty and integrity in the community.

It strains common understanding and would probably stun legal scholars the world over that the Court of Appeals, in this case, accepted the prosecution's explanation that the admittely false and uncorroborated prejudicial information and materials were submitted to the trial

judge for Brady v. Maryland, 373 u.S. 83 (1963) determinations, and praised the prosecutors for their prudence. (App. B., p. 8).

Here, the doctrine of Brady and its fundamental purpose have not simply been misread and grossly misapplied. The doctrine of Brady has been exhaustively prostituted and stood on its head. Moreover, if the opinion of the Court of Appeals in this case is allowed to stand, an open invitiation will have been extended to prosecutors everywhere to pretest and bolster their evidence with prejudicial and uncorroborated informants'

reports and other inadmissible materials, and secretly submit it to the trial judge under the guise of obtaining Brady determinations. The dangerous process, now officially sanctioned and well under way, can only be stopped by an immediate and authoritative intercession by this Court.

Indeed, one might quite understandably raise a question about the fairness and impartiallity of both the prosecutor and the trial judge under these circumstances, and their sense of responsibility for protecting the rights of those who stand before the bar accused, and

assuring the fair and proper administration of justice. Tumey v. Ohio, 273 U.S. 510 (1927); Berger v. United States, 295 U.S. 78 (1935).

II.

THE HARMLESS ERROR DOCTRINE WAS IMPERMISSIBLY APPLIED.

The harmless error doctrine was plainly impermissibly applied in this case. The due process flaw in the admittedly erroneous exclusion by the trial court of the two-part Pheterson letter is too fundamental to have been amenable to harmless error review. Vasquez v.

Hillary, No. 84-836, U.S. Supreme Court (decided January 14, 1986).

The opinion of the appeals panel is also plainly contrary to the established existing law of the Seventh Circuit; particularly in this close case where the panel also held that without Pheterson's testimony the evidence was insufficient to convict, and that Pheterson's credibility was highly suspect:

> "We need not stop to consider whether the error was of constitutional dimension . . . if rules of evidence are to command any respect, we must reverse convictions tainted by clear error where the accused might have been acquitted in the absence of the error."

> (Emphasis added). (Former Associate Justice Tom C. Clark, sitting by deisngation in United States v. Marrero, 486 F.2d 622, 627 (7th Cir. 1973).

The issuance of this Court's writ of certiorari is warranted, if not compelled in order to determine or more clearly define the legitimate and lawful boundaries of the harmless error doctrine.

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF PROSPECTIVE JURORS IN FEDERAL CRIMINAL TRIALS.

Until this Court speaks and calls a halt to the practice, the indignity of

racially motivated peremptory exclusion of prospective jurors will remain just one more badge of slavery refusing to die. Jones v. Mayer Co., 392 U.S. 409 (1968), (see concurring Opinion by Douglas J.).

However, despite existing inter-circuit conflict on the question, now eclipsed by established case record conflict within the ranks of the seventh Circuit itself (see order of theCourt of Appeals with dissenting opinion by Judge Cudahy, App. D), no court, other than the Court of Appeals for the Seventh Circuit has upheld the holding of an ex parte

conference between the court and the prosecutor, to the complete exclusion of the defendant, as the proper means for determining whether there has been a violation either of the Fifth Amendment due process or Sixth Amendment fair and impartial jury trial. See McCray v. Abrams, 750 F.2d 113 (2nd CIr. 1984); Booker v. Jabe, No. 83-1136 (6th Cir., Oct. 29, 1985). The approach approved by the Court of Appeals in this case smacks more of star chamber, than any approved form of American jurisprudence, and can only aggravate and extend the practice. It cannot possibly assure the fair administration of justice.

CONCLUSION

Petitioner respectfully submits that it would be extremely difficlut to advance either a stronger or more justifiable reason for the issuance of the writ requested herein than the need to preserve public confidence in the integrity and stability of the judicial process.

That confidence is challenged to the point of being sorely shaken by the use, treatment and manifest abuse of the principles and standards of due process, the harmelss error doctrine, and the doctrine of Brady, indulged in by the Court of

Appeals for the Seventh Circuit in this case.

Finally, it being that this Court now has under advisement Batson, and the inter-circuit conflict produced by racially motivated use of the peremptory challenge, as portrayed in numerous state court proceedings, this case provides an excellent opportunity for this Court to determine, or set the Fifth and Sixth Amendment standards to be applied to the same problem in federal criminal proceedings.

For the reasons shown in this

petition, it is respectfully urged that the writ prayed for be granted.

Respectfully submitted,

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No. 85-1317

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor's in camera submission of documents to the district court for a determination whether they should be disclosed to the defense violated due process.

2. Whether the court of appeals applied an incorrect harmless error analysis in concluding that petitioner was not prejudiced by the exclusion of a document that, while not admitted into evidence, was quoted extensively at trial.

3. Whether the district court committed clear error in concluding that the prosecutor showed an adequate non-racial explanation for his use of peremptory challenges to strike four black potential jurors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B9) is reported at 773 F.2d 136.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1985. A petition for rehearing was denied on December 5, 1985. The petition for a writ of certiorari was filed on February 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of nine counts charging wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false documents to a federally insured bank, in violation of 18 U.S.C. 1014. He

was sentenced to concurrent terms of 15 months' imprisonment on counts one through five, to be followed by five years' probation on the remaining counts, and he was also directed to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed (Pet. App. B1-B9).[1]

The evidence at trial is briefly summarized in the court of appeals' opinion (Pet. App. B2). It showed that co-defendant Deborah Bell, a commodities broker, was the intermediary for a fraudulent sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Petitioner, Bell's attorney, participated in the charged fraud. Pursuant to the sales contract, the buyer arranged for a $5 million letter of credit, to be paid to Bell upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Bell submitted the required documents and obtained the funds. However, she and petitioner had forged the documents and no beans were in fact shipped to Guatemala.

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals, and it does not present issues warranting this Court's review.

1. Petitioner first contends (Pet. 39-44) that the government violated his right to a fair trial by submitting "false or highly prejudicial information" (*id.* at 39) to the district court in camera. The court of appeals correctly rejected this claim.

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[1]Petitioner's co-defendants Deborah Bell and Michael Ball were similarly convicted on all ten counts, and their convictions were also affirmed on appeal. A petition filed by co-defendant Bell is currently pending before this Court (No. 85-976).

The facts surrounding this claim are set forth in the court of appeals' opinion (Pet. App. B8). Early in the trial, the government submitted to the district court, in camera, a report compiled by the Federal Bureau of Investigation concerning information supplied by a confidential source, James Gunnelles. Although the government believed that the material was inculpatory, it made the report available to the district court to allow the court to determine whether the report should be disclosed to the defense pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). See 2/24/83 Tr. 40. The district court concluded that the report was not discoverable and declared at sentencing that it "intend[ed] to ignore th[e] document in totality" and was "not going to credit [it] one wit [*sic*]." *Id.* at 17, 42-43.[2]

When a prosecutor has any doubt concerning the defendant's right to material under *Brady* or the Jencks Act, 18 U.S.C. 3500, courts have consistently recommended and approved the practice of submitting the material to the district court for an in camera determination whether it should be produced. See, *e.g.*, *United States* v. *Dupuy*, 760

---

[2]Petitioner was also informed during the trial that other materials had been submitted in camera for the court's determination whether they should be disclosed to defense counsel. The court informed all parties that "if I err, it will be error on the side of disclosure" (Tr. 218). The court did not order the government to turn over all of the documents. After sentencing, the government disclosed or described the remaining documents that had been submitted in camera, including a letter from an Assistant United States Attorney to the trial judge "tendering grand jury materials with [the] government's theory of the case"; notification that a potential government witness had sat briefly on the grand jury that returned the indictment against petitioner and his co-defendants; notification of a closed investigation of a government witness for an alleged bad act unrelated to this case; and other information concerning an investigation into a government witness's work record and an alleged bad act that occurred 10 years before. Pet. App. A3-A4.

F.2d 1492, 1501 (9th Cir. 1985); *United States* v. *Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985); *United States* v. *Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) ("[I]t would be the prosecutor's obligation to submit any material to the district court in camera if he had any doubts about whether it might be exculpatory."); see also *United States* v. *Agurs*, 427 U.S. at 106. Faced with a long and complicated trial, the prosecutor was justifiably desirous of avoiding inadvertent reversible error. Accordingly, as the court of appeals held, "the government acted prudently" in providing the material to the district court for its evaluation. Pet. App. B8. The court's rejection of petitioner's claim that the prosecutor acted improperly is unassailable and does not merit further review.

The decision below also correctly resolves petitioner's related suggestion (Pet. 43-44) that the in camera submission prejudiced the judge against him. The court of appeals characterized that as "a ridiculous suggestion" (Pet. App. B8), stating that "[w]e trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case" (*ibid.*). Indeed, petitioner has failed to identify any prejudicial rulings or conduct by the district court.

2. Petitioner next contends (Pet. 44-46) that the court of appeals erroneously applied the harmless error rule to reject his claim of prejudice from the exclusion of evidence at trial.

The facts relevant to this issue are recounted by the court of appeals (Pet. App. B5-B7). Irving Pheterson, a commodities broker in Miami who had a supplier in the Far East (*id.* at B2), was a key government witness against petitioner. Sometime prior to the trial, he wrote two draft letters to the prosecutor (*id.* at C1-C6, C6-C10) that the court of appeals described as "rambling, weird, but not demented" (Pet.

App. B5).[3] Petitioner sought to introduce one of the letters as substantive evidence in his own case to bolster his defense that Pheterson fabricated his testimony in exchange for immunity; the district court excluded the evidence on the ground that it was hearsay.[4]

The court of appeals concluded that the district court erred in excluding the evidence as hearsay. However, it observed that the letter, while not admitted as an exhibit at trial, was used extensively during cross-examination and that the letter did not establish that the witness's testimony was false. Pet. App. B6. The court noted that since the letter was effectively presented to impeach Pheterson's credibility at trial, the jury would not likely have reached a different verdict had it been given a copy of the letter during deliberations (*id.* at B6-B7). Accordingly, the court concluded that the trial court's evidentiary ruling was harmless.

Contrary to petitioner's assertions, the court's decision is wholly unremarkable. The court of appeals applied conventional and appropriate harmless error analysis.[5] It evaluated whether petitioner was prejudiced by the district court's error and concluded that, since the substance of the letter was made known at trial, reversal was unwarranted

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[3]Pheterson did not send the letters to the prosecutor and in fact objected when the prosecutor took them (Tr. 1039, 1282-1283).

[4]Although petitioner refers to both of the draft letters in his petition (Pet. 28-29) and includes both in his appendix (Pet. App. C1-C6, C6-C10), he offered only the first of the two letters at trial.

[5]Petitioner mistakenly asserts (Pet. 45-46) that the court of appeals' decision conflicts with *United States* v. *Marrero*, 486 F.2d 622, 627 (7th Cir. 1973), cert. denied, 423 U.S. 862. Even if an intra-circuit conflict exists, this Court does not sit to review such inconsistencies. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). Petitioner's suggestion (Pet. 44) that evidentiary rulings are not subject to harmless error review is frivolous.

(Pet. App. B6).[6] It considered the nature of the excluded evidence as well as other evidence that was introduced at trial and determined that the introduction of the letters would not have had any further evidentiary value (*id.* at B7). The court's analysis and conclusion are plainly correct.

3. Finally, petitioner contends (Pet. 31-38, 46-48) that the government's use of peremptory challenges to strike four black veniremen from the jury violated his right to an impartial jury. The propriety of a prosecutor's consideration of race in exercising peremptory challenges is currently pending before the Court in *Batson* v. *Kentucky*, No. 84-6263 (argued Dec. 12, 1985). However, there is no need to hold this petition for the decision in that case because there is here no factual basis for petitioner's claim.

In exercising seven peremptory challenges, the prosecutor struck the only four black veniremen on the jury panel. Defendants objected, asserting that the challenges were impermissibly used to exclude black persons. The prosecutor explained to the district judge in an ex parte in camera proceeding that he struck the veniremen on the basis of their education rather than their race.

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[6]Petitioner asserts (Pet. 29) that the letter demonstrates that Pheterson fabricated his trial testimony to satisfy the prosecutors. But as the court below correctly noted, Pheterson had given an outline of his evidence prior to being subpoenaed by the grand jury and, thus, before his need for immunity surfaced (Pet. App. B6). Moreover, the phrases in the letter to which petitioner refers are "consistent with Pheterson's simply having found it difficult to set forth the entire complicated story in a coherent form" (*ibid.*).

Petitioner also states (Pet. 25-26) that the court found that Pheterson was an "unreliable" witness and that "apart from Pheterson's testimony the evidence fell far short of proving petitioner's participation in the fraud beyond a reasonable doubt." However, the court also found that the testimony of other witnesses and petitioner's own conduct corroborated Pheterson's testimony (Pet. App. B4).

Because of the complicated nature of the charged fraud, the government believed that it needed well-educated jurors with business experience (Tr. 79-80). Of the four black jurors struck, only one apparently graduated from high school. In the prosecutor's opinion, however, that juror "did not appear to be particularly alert or interested" and "did not seem to have the natural capabilities that * * * are necessary" (*id.* at 79). Another struck juror had an eighth grade education and worked making brushes (*id.* at 34, 79-80); a third had attended high school but had no employment history (*id.* at 34); and a fourth apparently had some high-school level education and was self-employed in an unspecified job involving scrap metal recycling (*id.* at 54-55).[7] The prosecutor also noted that his three remaining challenges were similarly exercised to strike jurors who possessed only a high school education and lacked the business sophistication that the government deemed desirable in this case (*id.* at 79-80).

After considering this explanation, the district court concluded that race was not the criterion by which the peremptory challenges were exercised and that the government had an independent "strategic purpose" for its challenges (Tr. 81-82). The court of appeals accepted the district court's findings and affirmed (Pet. App. B9). The concurrent finding of fact by both courts below does not warrant review by

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[7]In describing this juror, petitioner states that he had "a high school education [and] had successfully operated his own small metal recycling business in the City of Chicago for 25 years" (Pet. 34). However, the juror simply stated during voir dire that he had "a high school equivalent" and did not describe his self-employment in scrap metal recycling, much less characterize his endeavors as "successful."

this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5.[8]

In sum, it is unnecessary to hold this petition pending resolution of *Batson* v. *Kentucky*.[9]

---

[8]Petitioner's accusation that the government's explanation was pretextual and that the jury selection process was racially motivated finds no support in the record. The profile of the jurors selected validates the government's explanation that it sought a jury comprised of well-educated persons with significant work experience. Of the jurors and alternates accepted by the government, four had college or post-graduate degrees; five had attended or were presently attending college; four had completed high school and had substantial or responsible employment. Only one alternate juror had less than a high-school education. She had completed three and one half years of high school, but her lack of a high school diploma was compensated for by her secretarial skills and work experience. See Answer of the United States to Petition for Rehearing with Suggestion of Rehearing en Banc 4-5.

Petitioner also contends (Pet. 48) that the ex parte nature of the proceeding at which the prosecutor explained the reasons underlying his decisions on his peremptory challenges "smacks more of star chamber, than any approved form of American jurisprudence." However, "as things now stand, a prosecutor need not defend his peremptory challenges." *United States ex rel. Teague* v. *Lane*, 779 F.2d 1332, 1333 (7th Cir. 1985) (Cudahy, J., dissenting from the order granting rehearing en banc). See also, *e.g.*, *Swain* v. *Alabama*, 380 U.S. 202, 220-222 (1965); *United States* v. *Leslie*, 783 F.2d 541, n.33 (5th Cir. 1986) (en banc); *Weathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983). Since the government was not required to give an explanation to the court at all, its offer to do so ex parte and in camera did not deprive petitioner of any benefit to which he was otherwise entitled.

[9]We note that the court of appeals recently granted rehearing en banc in *United States ex rel. Teague* v. *Lane*, *supra*, to determine "whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race" (Pet. App. D2). However, the court of appeals denied rehearing en banc in this case only one month before. The court of appeals presumably denied rehearing en banc in this case based on the panel's affirmance of the district court's factual determination that the prosecutor's use of peremptory challenges was not racially motivated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1986

DOJ-1986-04

No. 85-1317

IN THE

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OCTOBER TERM, 1985

ROBERT L. TUCKER,

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VS.

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Respondent.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The three questions presented for review appear at pages i through vii of the Petition for a Writ of Certiorari filed on February 3, 1986.

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I.

PREJUDICIAL SECRET EX PARTE COMMUNICATIONS BY THE PROSECUTION TO THE CHAMBERS OF THE TRIAL JUDGE

Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, all but concedes the government's embarrassment.

The so-called "in camera . . . information supplied by a confidential source, James Gunnelles," was not the only matter secretly submitted by the prosecution to the trial judge. (Justice Department Letter, Pet. App. A3-4).

And the use of the term "in camera" in this instance again masks the truth of what actually transpired in the trial court, namely, the secret and on going transmittal by the prosecutors, without the knowledge of, or any notice to the defense of plainly scurrilous, disparaging, prejudicial, baseless, and admittedly uncorroborated accusations of the commission by this Petitioner of other crimes, along with other adverse and prejudicial information pertaining to Petitioner, prior to and continually during the course of the trial.

Moreover, prejudicial pretrial submissions to chambers were consciously made at the time when the judge had under consideration rulings on critical pretrial defense motions, all of which were summarily denied by the trial court after reading and reviewing the secretly submitted materials complained of.

Contrary to the government's assertions there was nothing remotely, nor even pretextually, exculpatory about any of the materials so submitted.

Nor is it factually correct, as stated in the footnote at page 3 of the government's Brief in Opposition, that "after sentencing, the government disclosed or described the remaining documents that had been submitted in camera . . ."

Although this set of rather strange and

peculiar circumstances was called to the attention of the Circuit Court, as well as this Court, the sixteen months concealment of the complete facts of these prejudicial submissions to the trial judge's chambers, is yet to be explained, defended or even addressed by anyone at any government level, including the Office of the Solicitor General.

The issue raised on this point is not "whether we trust our judges" as stated by the Solicitor General and the Circuit Court, but the obvious adverse, negative and unfair implications arising from the apparent "practice" or "strategy" of the government in assasinating a defendant's character through the use of derogatory, prejudicial, and admittedly uncorroborated information, on the pretext paradoxically of obtaining Brady v. Maryland determinations, with only

the judge, the prosecutor and possibly a special agent of the FBI knowing about it.

The truth is the complete information as to these damaging submissions came to the attention of this Petitioner only through the persistence of Petitioner's appellate attorneys on or about May 10, 1984. The jury's verdict had been returned and judgment entered thereon six months earlier on January 13, 1983. Petitioner's trial counsel had unsuccessfully sought this information prior to sentencing. (See Tr. Feb. 24, 1983, pp. 26-34).

No case has been cited by the government, and no case has come to the attention of petitioner or his attorneys, that in any way mandates or approves the improper and plainly prejudicial conduct and ex parte communications engaged in by the prosecution in this case.

II.

DUE PROCESS AND HARMLESS ERROR

The case against petitioner turned solely upon the credibility of Pheterson, the author of the two page letter that was erroneously excluded by the trial court. Pheterson, himself, designated the communication "Part 1" (Pet. App. C-1), and "Part 2" (Pet. App. C-6); opening "Part 2", addressing the prosecutor, with the statement: "I have read your version of our talks and have answered you partially in part 1. I now feel I must make additional comments." The two parts are but one continuing document.

Reversal is particularly mandated in light of the unequivocal findings of the appeals panel on this question:

> ". . . [A]part from Pheterson's testimony the evidence fell far short of

> proving Tucker's participation in the fraud . . ." (Pet. App. B-6).
>
> ". . . [T]he jury was entitled to consider the letter as evidence that, as the defendants argued, Pheterson was an unreliable witness . . ." (Pet. App. B-6).

In light of the foregoing determinations, there can be no principled justification for holding that the exclusion of the "rambling" "weird" two part Pheterson letter from the jury during its deliberations was "harmless". U.S. v. Marrero, 486 F.2d 622, 627 (7th Cir. 1973).

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF BLACK PROSPECTIVE JURORS FROM THE TRIAL

Respondent denies the existence of any constitutional conflict, warranting this Court's resolution, between the result in this case and the decision of the U.S. Court

of Appeals for the 7th Circuit in United States ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985 - Rehearing En Banc granted one month after the denial of same to this Petitioner, Cudahy, J. dissenting, Pet. App. D-1), or the result reached by the U.S. Court of Appeals in this case, and the decisions in McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984), and Booker v. Jabe (No. 83-1136) (6th Cir. October 29, 1985).

While what happened here is apparent to any lay person, petitioner produced Dr. Hans Zeisel, a world-renowned authority on jury selection, who concluded "There can be no doubt that the prosecution went out of its way to eliminate all black prospective jurors from the trial. The government's response to Professor Zeisel has always been simply to ignore him.

The Court can be assured that there

will always be a nonracial "explanation" for striking this or that non-white prospective trial juror, and some certainly will be genuine, rational and valid. But, is it either rational or reasonable if one desires to obtain "an educated jury, with business experience," that all the black potential jurors be stricken? Every one of them? While equally "uneducated" white jurors were accepted!!

The issue here is simple. Do citizens, responding to their community's call for jury service, and persons who stand before the bar of justice accused in both state and federal courts realize the constitutional demands of Due Process and fair and impartial trial, free of the odium of rejection of persons from the judicial process on the basis of their race?

This Court has examined, and now has

under advisement, that vital issue in a plethora of state court cases. Batson v. Kentucky, U.S. Supreme Court No. 84-6263, pending. Petitioner accordingly prays that this Court accept this case, thus removing any doubt as to what the law and the procedure for applying it shall be in the federal judicial system.

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APPENDIX A

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Plaintiff,

v.

ROBERT L. TUCKER,

Defendant.

No. 82 CR 253—Judge Kocoras

ORDER

THIS MATTER COMING ON TO BE HEARD on the motion of defendant Robert Tucker, joined by defendants Deborah Bell and Michael Bell, by their respective counsel, and the Court being fully advised in the premises,

IT IS ORDERED:

1. The government shall provide to counsel for defendants by 5:00 P.M. on Thursday, May 10, 1984, a copy of all materials submitted to the Court *in camera*, in connection with the trial of this cause, which materials relate to information provided to the government by or about James Gunnelles.

2. The government shall provide to counsel for defendants by 5:00 P.M. on Thursday, May 10, 1984 a list of all additional materials supplied to the Court by the government, *in camera*, in connection with the trial of this

cause, which list shall identify the source of the document and describe, in general terms, the subject matter of the submission.

3. The government shall provide counsel for defendants, by 5:00 P.M. on Thursday, May 10, 1984, a copy of the following additional documents which were submitted to the Court, by the government, *in camera*, in connection with the trial of this cause:

4. Access to the documents ordered to be produced by the government in paragraphs 1 through 3 above shall be limited to the defendants and their counsel, and the contents of said documents shall not be disclosed or disseminated by them to any other person. To the extent that counsel for defendants deem it necessary to make reference to the contents of any of the aforementioned documents in their reply brief in the United States Court of Appeals, beyond those portions of the contents of said documents which have already been disclosed of record in this case, counsel for defendants shall provide the government with a copy of the pages of their reply brief which contain any such discussion, and, in the event that the government shall so request, that portion of defendants' reply briefs shall be submitted to the Court of Appeals under seal, together with a copy of this order and a request that the Court of Appeals retain that portion of the reply brief under seal.

ENTER:

/s/ Charles P. Kocoras
United States District Judge

Dated: May 9, 1984

(Letterhead of)
U.S. DEPARTMENT OF JUSTICE
United States Attorney
Northern District of Illinois

DCM:kfr

United States Courthouse
Chicago, Illinois 60604

May 10, 1984

HAND DELIVER

Richard P. Steinken
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

John A. Dienner, III
Pierce, Lydon, Griffin
and Montana
18th Floor
100 West Monroe Street
Chicago, Illinois 60603

Aviva Meridian Kaiser
IIT/Chicago-Kent College
of Law
77 South Wacker Drive
Chicago, Illinois 60606

Re: *United States v. Robert Tucker, Deborah Bell, and Michael Ball*, No. 82 CR 253

Gentlemen and Ms. Kaiser:

Pursuant to the district court's order entered in the above-named case on May 9, 1984, the following items are enclosed:

1. Letter from Assistant United States Attorney Stowell to Judge Kocoras, dated October 15, 1982, tendering grand jury materials with government's theory of the case;
2. Notification dated December 1, 1982, of Portia McKinney's brief service on the grand jury which later returned the indictment in this case;
3. December 8, 1982, submission of FBI internal communication relating information FBI received from James Gunnells concerning possible bad acts of others; and
4. December 14, 1982, submission of FBI internal communications relating information received from James Gunnells.

The two remaining *in camera* submissions relate to:

1. December 1, 1982, submission advising that a government witness was investigated for an alleged bad act having nothing to do with this case, and that the investigation was closed with no arrests or charges; and
2. December 8, 1982, submission of FBI internal communications concerning a government witness' work record between 1970-1976, and alleged bad act in 1972, investigated with negative results, and having nothing to do with this case.

Very truly yours,

DAN K. WEBB
United States Attorney

By: /s/ MARY STOWELL
Assistant United States Attorney

Enc.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-1438, 83-1439, 83-1444

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT L. TUCKER, DEBORAH BELL,
and MICHAEL BALL,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—**Charles P. Kocoras**, *Judge.*

ARGUED MAY 25, 1984—DECIDED SEPTEMBER 6, 1985

Before POSNER and COFFEY, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

POSNER, *Circuit Judge.* Michael Ball, Deborah Bell, and Robert Tucker were tried together for wire fraud (see 18 U.S.C. § 1343) and for submitting false statements to a federally insured bank (18 U.S.C. § 1014); were convicted by a jury; and were sentenced to prison terms of 9 months (Ball), 15 months (Tucker), and 2 years (Bell), plus periods of probation and, in the case of Bell and Tucker, were also ordered to make restitution of $5 million, subject to certain conditions. All three defendants appeal, raising a variety of questions.

* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

The scheme charged by the government worked as follows. Bell, a commodities broker in Chicago, with the aid of Ball, a freight forwarder in Miami, and Tucker, who was Bell's lawyer, made a contract to sell 6,000 tons of beans to Guatemala for $5 million. Bell did not have the beans, of course; she was a middleman; to get the beans she turned to Irving Pheterson, a commodities broker in Miami who had a supplier in the Far East. The contract with Guatemala was to be paid for by a letter of credit issued by a Guatemalan bank and confirmed by the Continental Illinois National Bank in Chicago. Under the terms of the letter of credit, the Continental Bank would pay Bell for the beans upon receipt of documents showing that th y had been loaded on board ship in Hong Kong en route to Guatemala, and Bell would then reimburse Pheterson. So the beans would go from Hong Kong to Guatemala, while payment would go from the Continental Bank to Bell to Pheterson. The letter of credit made the Continental Bank in effect the payment agent of the Guatemalan buyer.

Documents showing that the beans had been loaded were presented to the bank, and the bank paid the letter of credit. But the documents had been forged; the beans had not been (and never were) shipped. Pheterson testified under a grant of immunity that the three defendants had forged the documents. There is no question the documents were forged; the question is by whom. The defendants argue that Pheterson was the real architect of the fraud and testified against them to save his own skin. The government's theory was different: that since the letter of credit had not been made transferable, the defendants could not assign it to someone as collateral for a loan that would enable them to buy the beans needed to fulfill the contract, see generally White & Summers, Handbook of the Law Under the Uniform Commercial Code 747-51 (2d ed. 1980), and had turned to forgery to get the money they needed to buy the beans.

The substantive issue in this appeal, an issue apparently of first impression, is whether a letter of credit is within the scope of 18 U.S.C. § 1014, which punishes false statements made to influence a bank's action "upon any

application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." The false statements in this case were made to induce the Continental Bank to deposit $5 million in the defendants' account. The transaction fits comfortably within the statutory terms "application," "advance," and "commitment." The bank was obligated to pay Bell upon presentation of the required documents. This was a commitment; and the forged documents were in support of an "application" designed to induce the bank to honor its "commitment" and "advance" funds to the applicants.

Williams v. United States, 458 U.S. 279 (1982), on which the defendants rely, is inapposite. The Court held that check-kiting does not violate section 1014, because merely depositing a check that is not backed by funds is not a false statement. See *id.* at 284-85. The defendants in this case made explicit representations which were false in order to get Continental Bank to part with $5 million. Although we can find no cases under section 1014 involving letters of credit, our conclusion that a fraudulent representation made to induce the bank to pay the beneficiary violates the section is supported by analogy to several cases decided after *Williams*: *United States v. Price*, 763 F.2d 640, 643 (4th Cir. 1985); *United States v. Davis*, 730 F.2d 669, 673 (11th Cir. 1984); *United States v. Shaid*, 730 F.2d 225, 232 (5th Cir. 1984); *Prushinowski v. United States*, 562 F. Supp. 151, 156-58 (S.D.N.Y. 1983).

We next consider the sufficiency of the evidence to convict. Pheterson was, as the judge remarked, an unreliable witness, not only because he had an incentive to shift the responsibility for the fraud to the defendants but because his testimony contained contradictions and memory lapses, and, more seriously, because there is evidence that he is mentally impaired (more on this shortly). Nevertheless there is no serious question about the guilt of Bell and Ball, at least. Fingerprint and handwriting evidence, statements to third parties, testimony from bean suppliers, and the testimony of Tucker's secretary corroborate Pheterson's testimony against them.

Although there is more question about Tucker's guilt, we are persuaded that a reasonable jury could find sufficient corroboration of Pheterson's testimony to convict Tucker, even if the jury maintained as it should have done a healthy skepticism about Pheterson's honesty and recollection. Among the documents submitted to the bank on September 5, 1980, to get the letter of credit paid was one that certified that the beans were on board ship in Hong Kong. But shortly afterward Tucker got approval for a letter of credit to pay for beans to fulfill the contract. This shows that Tucker knew the document was false, albeit after the document had been submitted to the bank. Some of his secretary's testimony indicated that Tucker was present when questionable documents were being prepared (for example, a phony bill of lading for the beans purportedly shipped from Hong Kong), and she testified to statements made by him that were consistent with guilty knowledge. And Tucker wrote checks to himself for a total of $68,000 from an account in which the letter of credit had been deposited. These payments ostensibly were to repay a loan he had made to facilitate the transaction, but even so this suggests that his role was entrepreneurial, and not just that of a lawyer (his theory). Although apart from Pheterson's testimony the evidence fell far short of proving Tucker's participation in the fraud beyond a reasonable doubt—most of it being consistent with his playing just a lawyer's role—the significance of the other evidence is that it corroborates Pheterson's testimony. Ordinarily a jury can convict on the basis of a single eyewitness's testimony, but we may assume that where the witness was as unreliable as Pheterson there would have to be some corroboration. There was.

We turn now to the alleged procedural errors at the trial. The district judge refused to order a psychiatric examination of Pheterson or conduct a hearing on his competence to testify, and the defendants argue that this was error because Pheterson (they argue) obviously had serious mental problems. For reasons discussed in *United*

States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984), and unnecessary to repeat here, we hesitate to reverse a district judge's refusal to order that a witness submit to a psychiatric examination; and there was no abuse of discretion by the judge in this case. The defendants make much—too much—of the fact that in 1978, two years before the event in issue, Pheterson had brought a personal-injury suit, later dismissed, in which he claimed to have suffered brain damage as a result of being exposed to dry-ice fumes (i.e., carbon dioxide); of his subsequent statements that the carbon-dioxide poisoning had caused an impairment of his memory; and of a letter that Pheterson wrote to an assistant United States attorney in which he discussed the conflict between his "oversoul" and his "undersoul." In fact there is no indication that Pheterson had suffered significant brain damage caused by dry-ice fumes or anything else (he was conducting business as usual two years after bringing that suit), or that he had any mental illness, though he admitted that he had a problem remembering things—a type of problem too common, however, to be suggestive of a mental disease or defect that psychiatry might elucidate. The letter in question is rambling, weird, but not demented. The reference to a conflict between the "oversoul" and the "undersoul"—between what Freudian psychologists call the superego and the id, and what laymen a generation ago called one's "good angel" and one's "bad angel"—is not evidence of mental illness. The letter was a rough draft that Pheterson was reluctant to turn over to the assistant United States attorney; and many rough drafts, like the unedited thoughts that run through people's minds, are pretty strange. Although the defendants' psychiatric expert said that Pheterson's brain injuries and statements were consistent with "Organic Amnestic Syndrome," "one of the major symptoms of [which] is confabulation, the recitation of imaginary events to fill in gaps in memory," many minor symptoms are "consistent" with major diseases; a cough is consistent with lung cancer. All the record of this case shows is a troubled and

evasive witness desperate for immunity and selective and self-justifying in his recollections. It does not show a man who is demented, and the judge was not required to force him to submit to an examination by a psychiatrist. Cf. *United States v. Eschweiler*, 745 F.2d 435, 438 (7th Cir. 1984). The witness in *Gutman*, in contrast, had a long history of serious mental illness.

The letter we have just mentioned is a main prop of the defendants' claim that the government pressured Pheterson to tell the government's version of the events constituting the fraud, regardless of what he actually believed, by dangling immunity bait; for the letter ends: "Every time I start to writing I feel that I am not 'saying it right' so I tear it up and start over. I hope this is what you need. Please advise. Thank you." But Pheterson had given the outline of his story in connection with a civil suit before being subpoenaed by the grand jury; the letter from which we have quoted is consistent with Pheterson's simply having found it difficult to set forth the entire complicated story in a coherent form; and the assistant United States attorney to whom the letter was addressed repeatedly adjured Pheterson to tell the truth.

Tucker also objects to the judge's refusing to let him introduce the letter into evidence as an exhibit. The letter was incorrectly excluded as hearsay. It would have been hearsay if offered to show the truth of what it contained, but it was not hearsay when offered to undermine the writer's credibility as a witness. Though we ourselves are not troubled by the discussion in the letter of the war between Pheterson's "oversoul" and "undersoul," the jury was entitled to consider the letter as evidence that, as the defendants argued, Pheterson was an unreliable witness. But the error in excluding the letter from the documentary evidence in the case was harmless. The defendants used the letter to cross-examine Pheterson, so that much of it was read to the jury. It was used, of course, to undermine Pheterson's credibility, which is the only pur-

pose for which Tucker wanted the letter used. We cannot imagine that the jury would have reached a different result by having the letter to reread in the jury room with the extensive other documents in the case.

Tucker objects to the district court's refusal to admit the results of a lie-detector test which he had taken and passed. In this circuit the admissibility of lie-detector test results has thus far been left to the discretion of the trial judge. *United States v. Williams*, 737 F.2d 594, 611 (7th Cir. 1984). Perhaps some day we will have to lay down circuit-wide policy on the question but this is not the case in which to do so. Tucker refused to agree before he took the lie-detector test that the results, whatever they were, could be used in evidence. Such a refusal could well make lie-detector test results unreliable. See *United States v. Feldman*, 711 F.2d 758, 767 (7th Cir. 1983); but see Raskin, Barland & Podlesny, *Validity and Reliability of Detection of Deception* 6, 21-22, 24-25 (Natl. Inst. of Law Enforcement and Crim. Justice, June 1978). The lie detector does not peer into the mind; it is a test of (relative) anxiety, and if the person taking the test has nothing to lose and everything to gain, he may not be anxious and his passing the test may prove nothing. Whatever the force of this doubt, it is readily alleviated by agreeing to allow the government to put the test results, whatever they may be, into evidence if it wants; and a defendant who refuses to make such an agreement is in a poor position to challenge the district court's exercise of its discretion to refuse to admit the results.

Tucker also complains about the district judge's refusal to let him address the jury in closing argument. Tucker is a lawyer and could if he had wanted have represented himself (of course he could have done so even if he were not a lawyer), but in fact he had three lawyers at trial and his own participation as counsel was minimal. The judge was concerned that since the jury had seen Tucker as a defendant, not as a defense lawyer, it would

be confused if he addressed it in closing argument; the jury would think it was being addressed by a defendant, not by a lawyer. Tucker had declined to testify, thus sparing himself cross-examination. To allow him to address the jury would in effect have allowed him to testify without being subject to cross-examination. This is the same "heads I win, tails you lose" tactic that Tucker attempted with the lie-detector test. The judge did not abuse his discretion by not allowing Tucker to address the jury.

Next the defendants complain about certain documents that the government submitted to the district judge *in camera*. The documents consisted of reports from a confidential government informant on other misdeeds of the defendants, and the purpose of the submission—the ostensible purpose anyway—was to make sure the government was not required to give any of this information to the defendants. The judge ruled that it was not exculpatory, and the defendants argue that the real purpose was to poison the judge's mind against them. But we think the government acted prudently, since if it had not submitted the documents for the judge's inspection it might have opened itself up to a later attack for violating the defendants' rights under the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). As for poisoning the judge's mind, that is a ridiculous suggestion. Anytime a judge grants a motion to suppress evidence against the defendant, it means the judge is in possession of damaging evidence that the jury will not see; and yet we do not on that account require that the trial be conducted before another judge, who is innocent of this evidence. We trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case.

The defendants also argue that the prosecutor improperly used four of his seven peremptory challenges to

exclude all four black veniremen from the jury, with the result that the jury was all white. Whether the exercise of peremptory challenges on racial grounds violates a criminal defendant's rights when there is no suggestion that the prosecutor's office follows a policy of racial exclusion (that is, uses racially motivated peremptory challenges systematically, and not just occasionally) is an issue now before the Supreme Court. See *Batson v. Kentucky*, 53 U.S.L.W. 3757 (cert. granted April 23, 1985). However it is resolved, these defendants are unlikely to be helped. For the judge in this case, though not required to do so, asked the prosecutor to explain the basis of the four challenges of blacks, and the judge believed the prosecutor's explanation that the motive was not racial. The prosecutor wanted an educated jury that could understand letters of credit and the other aspects of this complicated commercial transaction, and the four blacks happened to have very little education or commercial experience. The judge did what courts that consider racial peremptory challenges unlawful require the trial judge in these cases to do; he satisfied himself that racial bias had not been responsible for the exclusion of the blacks. See, e.g., *McCray v. Abrams*, 750 F.2d 1113, 1131-33 (2d Cir. 1984). His determination, although challenged by the defendants, was not clearly erroneous, and therefore binds us.

The other grounds for reversal advanced by the defendants have no possible merit.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Verbatim Two-Part Letter of Irving Pheterson To Mary Stowell, Assistant U.S. Attorney

Dear Mary Stowell,

This letter is in two parts. They were written weeks apart. The delay was caused by my desire to be complete as possible.

Part 1

In response to your comments regarding the completed Proffer that you sent to me, you have told me verbally, your thoughts regarding the Proffer. You have given me an opportunity to add, or expand on the knowledge and experience relating to the events involving (D. Bell, Bob Tucker, Rumex Internation, combined with their business dealings with International Assoc. of Grocers, Inc., myself and other people of Firms between Aug. 19th and Sept. 10, 1980.

You have suggested to me that from your investigation of other people that you have created a possible scenerio of events which led you to believe the following.

The Government of Guatamala issued a Non Transferrable L/C to Rumex International, which meant the Government of Guatamala was led to believe that Rumex either possessed one of the following possibilities.

A. Owned and Possessed the beans and should ship them at will to Guatamala, after which, proper documents, they could cash the L/C at the Continental Bank.

B. That Rumex has sufficient credit or funds to buy the beans and ship them to Guatamala, after which they could negotiate the L/C.

You further state that being that Rumex did not

> 1. Have the beans or 2. Have funds or credit they decided. 3. To create false documents and Negotiate the L/C. 4. Use the funds to buy the beans. 5. Ship the beans to Guatamala. 6. Keep the profit, and you further stated that it was believed—that action would benefit everyone and hurt no one

You have told me that the our Government could grant me immunity, or not use my Proffer information against me in the future. So that the wider I detail my experience in my Proffer the greater the scope of the immunity could cover. Should I however limit my experience in the Proffer and that knowledge was challenged by people of firms in the future, I would then possibly suffer the consequences of revoking the Immunity and or be prosecuted for perjury.

In an effort to respond to your suggestions I am now detailing further information concerning the events hereinbefore discussed.

I must first preface my remarks by explaining that the more I age the more I become knowledgeable of the (Entity or oversoul Relationship) and our Human Creation. If you or the people who will judge the sincerity of my remarks are "aware" of this relationship then my remarks will be easily understood—If however you or the people reading this not "aware" then I will try to state it in simple terms.

1. We experience and gain knowledge and store it on many levels of subconsciousness

2. The (illeg.) and (illeg.) is directly related to our Physical Being Survival Pattern too. (This is similar to the BLOCKING of Horrible events that the mind cannot (illeg.) and continue to function normally)

3. (illeg.) which we believe to be beneficial to our Physical Being, But violate the emotional well being of our oversoul are stored in the deep recesses of the mine and other events (illeg.) which the oversoul will not consider a violation of the (illeg.) principal.

4. At some later time in our "present" lifetime or in a "later" life the oversoul will deal with the "lesson" to be learned from that event.

Mary, by your personal visits and by our phone conversations you have started an "opening" in the process of Revealing the information relating to the aforementioned events

1. First to myself
2. Second to the ability to write these remarks
3. Third to my fellow Partners to whom I can only now verbalize the occurances and action, which would hopefully not involve them in any wrong doings.

I now feel my oversoul has "allowed" me to write this narrative because the threatening conditions have been removed. The ensuing information has been revealed to me only a little at a time.

Debra Bell did in fact over a period of time, by phones calls and in person outline her general plan. The information was not given to me in one statement, But rather like a puzzle which I put together (This is the information I have received from my subconcious)

The Reason I never spoke about it to my associates or family has been outlined herin before,

I (illeg.) wondered then as I wonder now why she confided her "plans to (illeg.)

1. She cashed the 1/c with bob Tucker not me.
2. She prepared the forged papers with Bob Tucker in his office with his employees on his typwriter not mine.
3. I could not help her with the papers as This was the first time I had ever seen an 1/c. She on the other hand had years of experience with 1/c's
4. She could have used any stationary not mine and the bank would have paid regardless of name on the billhead
5. The various "Certificates" she proported to be from foreign Countries were made on plain typing paper from Bob Tuckers office, not mine.

6. She made a series of errors in dates. citys. amounts etc. she never bothered to ask me to coach her.

It occurs to me now that she was preparing me and my associates for her alibi. And to blame us. if her plan would go wrong, she could then muddy or cloud her actions with the excuse that we was in someway responsible and she could claim, that she was an innocent party and was duped by us—

My oversoul "perhaps" allowed me to prepare, and limit my Physical actions to the Aug 15th agreement which I took to Chicago and used as a guide line for my Physical Actions. The thin line of awareness with my phyical conduct and the emotional retreats of my mind has caused me Trematic experiences until this day and as I write. I am sorry for my associates who now must defend themselves from a lawsuit by Debra Bell.

Part of the reason I am able to remember is, Because of all of the conversation that goes on these days between all the parties. I Basically believed we were "used" by Debra Bell for Two Reasons.

1. As I said before, as an alibi at a future time if she could create a plausable chain of events to draw the pressure away from her.

2/ As a source to buy the beans if and when she had the money.

I do not believe she "used" me as a teacher to forge Documents—she may have seized upon the opportunity to "use" Mike Ball when she was presented the opportunity.

You have raised a point in one of our conversations was I invited to be an active partner in her scheme with division of profits and Risks an all levels—my answer is obviously no. as I will discribe below.

1. If I were faced with the problem of non transferable l/c I would have devised a legal remedy. to have NON TRANSFERABLE CLAUSE in the l/c. I would have formed another Rumex Internation Corp. in Hong Kong—Then

I would have invited Pantex and Rumex - International Assoc. of Grocers and the Primary shipper, to take stock in the new Corp, proportionately with there financial interest, or value in the deal. Then the primary owner of the beans could ship the beans and all the interested parties could go to the Continental Bank, cash the 1/c with everyone present and divide the proceeds. This would be absolutely legal and in full accord with the 1/c because the documents would be legalized and there would be all winners and no losers.

2. If how ever I were invited to join her scheme on the illegal basis (which I know my oversoul would not have permitted) than in that unlikely event I would certainly not have let her control 96% of the funds and my self to control 4% of the funds. (4% is $198,000.00).

I believe it will become important for us to expand on the nature of the Human Psyche in the Future As I understand it, some People call it their soul or oversoul or entity, we were all formed or created by ALL THAT IS who is of course our creator. I struggle daily with the duties and responsibilities of a father, and husband in order to build a stable and good life. I believe that people keep Experiences and Knowledge in the deep recesses of the sub-conciouss levels of their minds out of reach or touch with the daily active concious awareness. But our oversouls guides us by "impulses" and our dreams, which puts us in touch with our past, and future and so we are enabled to form the events of the present. I believe our thoughts are chanelled through creative avenues which are opened to our physical being by our oversouls, so as not to violate it's perfect state of grace.

Knowing Our society of Human Species however, I think there is also a compainon (under-soul) or (devil) who fights tooth and nail with in all of us for possesion of our physical reality. This would account for the disasters in peoples lives when they become involved in crime, murder and the like. Fortunately I have been dominated by the oversoul not the undersoul in my present physical life.

I am extremely relieved that I can now share with you what you have been pressing for I hope you can understand that I could not give you a simple yes or no answer before, when you were interested not in my observeable actions, but rather in my deep emotional thoughts.

The foregoing statement was written, partially 4 weeks ago I did not send it then because I felt more information was in my mind, and had to come out. The following statement is a continuation of the events as they surface.

Part 2

Dear Mary Stowell

I have read your version of our talks and I have answered you partially in Part 1 I now feel I must make additional comments.

1. I believe some information in your letter was omitted.
2. Some information was out of sequence.
3. The language used could have slightly different meanings.

The entire episode must be discussed as a whole, not specific sentences with a definite yes and no answer, in order to get at the heart of the EVENTS. Debra Bell asked me to work on many deals not just one. I will try to remember as many as I can.

1. 10,000 Mt. Skim Milk Powder from Belgium to Guatamala
2. 6,000 Mt. Black Beans for Guatamala.
3. 50,000 Mt. Yellow Corn for Africa.
4. 6,000 Mt. Lentils
5. 10,000 Mt. Black Beans for Guatamala.
6. 10,000 Mt. Red Beans for Mexico
7. 10,000 Mt. Black Beans for Guatamala.

These are rough estimates as I remember. She then created a variety of payment methods and abilities according to the different buyers. Some were very involved while others were simple. Some needed to be developed in stages, several needed sample documents, as I have outlined to you. Whenever I expressed concern about the legality that could involve me and my associates, even with my limited passive participation. she would say "Oh forget about that deal I've got that covered, what I really meant was this Deal.

I had a gut feeling that she was doing something wrong. Right from the first phone call. Thats why I outlined the limits of my participation in the Aug 15th agreement and I stuck to it.

THE GOALS I SET FOR THE TRIP TO CHICAGO WAS

1. Debra Bell promised me $5,000.00 weather or not the deal was made during the trip on any of the possible sales.

2. I believed I would learn the names of the buyers so I would be advancing (illeg.) in the International Business.

3. Hopefully we would be paid our commision and receive an L/C for a customer and complete my first deal.

You asked me questions concerning a set of documents that Debra presented to the bank for payment, you have told me my answer was not consistent with other information you got from your investigation. From your prospective you are probably right. But from my reality I cannot be positive of my knowledge, because at that time I was considering many options and I could only guess at what Debra's true intent was. There was many sets of Documents she prepared for other deals that she may have tried to collect on, from other L/C's in other banks. You must understand there was a flurry of activity in Bob Tucker's office. Present was myself -Mike Ball Debra Bell -Bob Tucker- 3Secretaries-2other Lawyers 4 Men from Guatamala. The activity did not just center around

one deal with one L/C and one Bank and one set of documents as you seem to think occurred. So when you ask NOW what was my knowledge of what she was doing with the documents the day she cashed the L/C with Continental Bank. As you can well imagine, this is almost impossible to answer because the activity I observed or felt was happening was only guess work at that time. Your question to me is, did I believe the documents prepared by Debra Bell and Bob Tucker were capable of being accepted by the bank as genuine. To that my answer is no. The reason for this is more completely listed in Mr. Fields suit against the bank. I believe there were over 15 Errors the Bank overlooked or choose to disregard.

Your other question is, was I conciously aware of Debra Bell's intentions to use the "sample" documents as an aid in presenting the L/C for payment. With hindsight I could certainly say yes, because I am faced with the reality of the facts as they have been surfacing. But at the time my step by step "Dance" as it was being acted out with Debra Bell that my Knowledge of her thoughts- Movements-intentions-plans-schemes etc- was obscured by.

1. Her own shifts in deals and "stories" with endless Divisions, coupled with her dangling "carrots" of New deals and changing subjects in a second.

2. But I stuck to the goals I set out to do, and to the limitations of my participations as outlined in the Aug. 15th agreement. I felt like a Zombie or a Robot, not wanting to sway from my course of action—Most of all I relegated to my subconscious anything that began to sound wrong. I felt that if my actions were legal, Than I could not Jepardize my associates and my self in any wrong doing.

I realize now that Debra Bell is a MASTER of contriving and MANIPULATING events, situations and the people she wishes to place in them.

I remember severals times "play acting ROLES" for my my own benefit. She started a Discussion regarding "creating false documents" That time I played the role to the

hilt, pretending to be a willing participant in her scheme. At that point I was interested in seeing how she fabricated a LEGAL ending to that particular scenerio. I even made calls to various people with her and Bob Tucker listening in on extentions, one of those calls was to Stanley Upin in New York, I tried to enlist his aid in getting false "sample" documents, they both listened in on the phone as we spoke I had since regreted the incident on my part. Because this is probably how she found out who my supplier was in Hong Kong, She could easily trace the names in the conversation later.

There were other playacting regarding other 1/c's with other products which are unrelated to your present investigation.

I suppose I could write a Book about my thoughts before- during- and now after the whole affair. Everyone seems to think I might have acted *more* wisely, my associates are reminding me almost every time I see them that I have to repay them someday for the legal expenses and time that they are spending to defend themselves from Debra Bell's *ridiculous lawsuit*

I must comment on Debra Bell's defense as I read in the papers she served on me. I really lack the words to fully discribe the shock and indignation and the RAGE THAT ENGULFS ME as I read how she says her role was only "passive and minor in Nature" and it was my wrong doing which led her astray. Words of my true feelings flood my mind in rapid succession, I have to hold them back for now—BUT THE TIME WILL COME when they will pour like a TYPHOON upon her conciousness—and the RAGE within me will be unleashed at the very CORE OF HER SOUL. I simply cannot let the monstrosity of the words of defense, go unprotested to say the least.

I am sure NOW, that I must have been aware of Debra Bell's intent to use the sample documents as valid documents and cash them at the Continental Bank. What started as a fairly simple deal developed into a complicated puzzle in my mind. I told you of the incident in

the restaurant when Debra Blew up and told me to "hit the road" when I started to probe her too deeply about a matter that she did'nt want to talk about. But at this point I'm glad I could get it down on paper. Although as I reread my 3 statements to you plus the one I gave to Mr. Fields, I can see some contridictions in my statements. I'm sure you understand the confused circumstances and how they occured in the maze and webs woven by Debra Bell. I probably should have recalled my earlier statements (if that is possible) and started from scratch But on second thought the way things emergeged from my mind and in the interest of saving time I am going to let things stand Because I only wrote them with the Knowledge and Experience I was aware of at the time that I wrote them. I suppose as things surface I will remember other details-

I am sorry for the long delay on my part in responding. Aside from the problem of making a living which is not going well at all. Every time I start to writing I feel that I am not "saying it right" so I tear it up and start over. I hope this is what you need. Please advise Thank-you

Sincerly

/s/ Irving Pheterson

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2474

UNITED STATES OF AMERICA, ex rel. FRANK TEAGUE,

Petitioner-Appellant,

v.

MICHAEL P. LANE, Director, Department of Corrections and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1934—**William T. Hart,** *Judge.*

Circulation Under Circuit Rule 16(e)
with Respect to Rehearing En Banc

DECEMBER 30, 1985

Before CUMMINGS, *Chief Judge,* BAUER, WOOD, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges.*

ORDER

This case was argued on April 9, 1985 to a panel consisting of Judges Cudahy and Coffey, together with Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation.

Pursuant to Circuit Rule 16(e), the panel opinion in this case was circulated to all the judges of the court in regular active service. A majority of the judges in regular active service have voted to rehear this case *en banc*, the time of argument to be set at a date convenient to the court.

CUDAHY, *Circuit Judge*, dissenting:

This case involves the question whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race. The matter was originally heard by a panel consisting of Judge Coffey, Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation, and me. The panel opinion, which I wrote, vacated and remanded on the grounds that the exercise of peremptory challenges by the prosecutor in this case violated, at least prima facie, the defendant's Sixth Amendment right to an impartial jury. The panel opinion, together with a dissent by Judge Coffey, was then circulated under our Circuit Rule 16 to the full court, which voted to rehear the matter *en banc*. I shall briefly outline here the essential content of the opinion of the panel majority to indicate why I believe that *en banc* review is unnecessary. Judge Peck has requested that I record his agreement with the views which follow.

Frank Teague, a black, was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. Each side had ten peremptory challenges and the state exercised all of its challenges to exclude black

jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial, arguing that the state was denying Teague a trial by a jury of his peers by excluding potential jurors on the basis of race. These motions were denied. Although, as things now stand, a prosecutor need not defend his peremptory challenges, the state offered two rationales for its actions: that it was attempting to obtain a balance of men and women on the jury and that it had excused a number of young people. The Illinois Appellate Court noted that the record did not support the state's explanation but held that under existing law it could place no restriction on a prosecutor's use of his peremptory challenges.

The precise issue raised was whether a defendant's Sixth Amendment rights are violated when a prosecutor uses his peremptory challenges to exclude members of one race from a petit jury. Such a use is not a violation of the Equal Protection Clause of the Fourteenth Amendment, so long as the exclusion does not prevent members of a race from *ever* sitting on juries, "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim may be." *Swain v. Alabama*, 380 U.S. 202, 223 (1965). *Swain* was clearly decided on equal protection grounds and, although the Court did not question the standing of the defendant Swain, the rights asserted and addressed by the Court were in large measure the rights of blacks who were prevented from serving as jurors. But the right to sit on a jury is quite distinct from the right of a defendant to be tried by a jury from which members of his race have not been systematically excluded.

The Fourteenth Amendment guarantees due process as well as equal protection, but at the time *Swain* was decided it was not yet settled which jury-trial rights were guaranteed by that amendment's due process clause. We now know that the Sixth Amendment applies fully to the states through the Fourteenth Amendment, *Duncan v.*

Louisiana, 391 U.S. 145 (1968); what has not been resolved is whether the Sixth Amendment guarantees the right to a jury from which eligible jurors have not been excluded because of their race. This question was raised but not decided in two recent cases in this circuit. *See United States v. Clark*, 737 F.2d 679 (7th Cir. 1984) (facts of case failed to raise presumption of racial motivation); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168 (7th Cir.), *cert. denied*, 105 S. Ct. 306 (1984) (habeas petitioner waived objection by failing to raise it in state court). Other circuits have split on the question, *compare Weathersby v. Morris*, 708 F.2d 1497 (9th Cir. 1983), *and United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (no Sixth Amendment right), *with McCray v. Adams*, 750 F.2d 113 (2d Cir. 1984), *and Booker v. Jabe*, No. 83-1136 (6th Cir. Oct. 29, 1985), and the Supreme Court has heard oral argument on this question in an appeal from a state supreme court, *Batson v. Kentucky*, 105 S. Ct. 2111 (1985).

As Judge Peck and I have viewed it, the question presents a clash between two devices, the peremptory challenge and the requirement of representativeness in the jury pool, both of which are intended to secure an impartial jury and neither of which we wanted to see destroyed. For the most part they do not conflict, but when they do, one must give way partially so that neither will be destroyed.

The Sixth Amendment guarantees that the jury pool from which a jury is selected must contain a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975). The representativeness requirement does not extend directly to the petit jury—no defendant can demand a perfect cross-section on his jury—but the fact that there is not a direct connection does not mean that there is no connection at all. If the Sixth Amendment has implications for the jury pool, that can only be because it has some implication for the jury that actually sits at trial. In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court held that a six-person jury was con-

stitutionally acceptable, noting that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." *Id.* at 100 (emphasis added). In *Ballew v. Georgia*, 435 U.S. 223 (1978), it held that a five-person jury was not, expressing concern about "the ability of juries truly to represent the community as membership decreases below six." *Id.* at 242. Although the Sixth Amendment does not guarantee a representative trial jury, it does appear to guarantee the *possibility* of a representative jury. In the absence of that possibility, the negative effect upon defendants who belong to the group excluded is not difficult to imagine; it will be especially severe where the group suffers from community prejudice. Judge Peck and I thought it beyond dispute, therefore, that the Sixth Amendment's protection lies in its requirement that the state cannot interfere with the possibility that the jury will be representative.

There is no constitutional right to peremptory challenges, *Swain*, 380 U.S. at 219, but the peremptory challenge has a long history, serves an important function and should not lightly be narrowed. The peremptory challenge allows each side to eliminate jurors whom it suspects, for reasons it cannot articulate or for reasons not reaching the level of cause, of being partial to the other side. With peremptory challenges, the resulting jury should be closer to the ideal of a body without sympathies for either side. And yet the peremptory challenge may conflict with the goal of securing to each defendant the possibility of a representative jury, for with enough peremptory challenges, a prosecutor can, if he chooses, make sure that members of a minority group do not appear on any jury where their presence would be a hindrance to him.

Judge Peck and I therefore believed that the only option open to the court in these circumstances was to limit the peremptory challenge in some way. We did not believe that this mechanism for insuring jury impartiality would

be destroyed if abuses of it were made subject to objection. We therefore suggested a limitation that we think would be the least intrusive while complying with the demands of the Sixth Amendment. Rather than reduce the number of peremptory challenges, as some have suggested, we sought to limit the prosecutor with a procedure that would screen out only cases of discriminatory abuse. Two circuits have placed such limits on the use of the peremptory challenge to avoid violating the Sixth Amendment. *See Booker v. Jabe, supra,* and *McCray v. Adams, supra.* A number of other circuits have done so as an exercise of their supervisory powers. *See United States v. Leslie,* 759 F.2d 366 (5th Cir. 1985) (*en banc*); *United States v. Jackson,* 696 F.2d 578, 593 (8th Cir. 1982), *cert. denied,* 460 U.S. 1073 (1983). *See also United States v. McDaniels,* 379 F. Supp. 1243, 1249 (E.D. La. 1974). State supreme courts have followed a similar route, *see State v. Neil,* 457 So.2d 481 (Fla. 1984); *Commonwealth v. Soares,* 387 N.E.2d 499 (Mass. 1979); *People v. Wheeler,* 583 P.2d 748 (Cal. 1978).

According to the procedure adopted by these courts and suggested by Judge Peck and me, the defendant would have to raise a timely objection and make out a prima facie case by showing that the persons excluded were members of a cognizable and suspect group and that those challenged were more likely to have been challenged because of the group they belong to than because of any specific bias. Once the prima facie case was made, it would be up to the prosecutor to rebut it. The appropriate rebuttal would involve bias, of course, because bias is supposed to be the reason for the challenges in the first place. The prosecutor's rationale would not have to be one that would sustain a challenge for cause, but it would have to be both race-neutral and supported by the record. This procedure would not prevent the prosecutor from excluding two, or three, or four on the basis of race; but it would prevent him from either using *all* of his peremptories to exclude members of a race, or from using his peremptories to systematically exclude all members of a

race. All of this would fall short of destroying the peremptory challenge. The prosecutor would be free to use his challenges as he chose, so long as he did not use them for the impermissible purpose of systematically excluding blacks, or members of one cognizable group, from the petit jury.

For these reasons, which seem persuasive, I think *en banc* review unnecessary and I therefore respectfully dissent from the order directing rehearing *en banc.*

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 v.

ROBERT L. TUCKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—Charles P. Kocoras, *Judge.*

ORDER

On October 10, 1985, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 vs.

ROBERT L. TUCKER,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253
Honorable Charles P. Kocoras, Judge Presiding.

EMERGENCY SUPPLEMENTAL MOTION TO RECALL AND STAY MANDATE; TO VACATE ORDER OF DECEMBER 5, 1985; TO CONSOLIDATE CAUSES; OR FOR ALTERNATIVE RELIEF

Defendant, ROBERT L. TUCKER, again appearing pro se, by prior leave of this Court granted in September 1985, supplementing the motion for recall and stay of mandate filed herein by Robert S. Atkins, Esq., on December 26, 1985, respectfully states and shows unto the Court as follows:

By motions previously filed herein on and before September 30, 1985, in support of requests for extension of time, and to file an oversized Petition for Rehearing pro

se, this defendant expressly advised the Court that his attorney, John C. Tucker, who was responsible for handling and arguing this defendant's appeal, had left this jurisdiction, was unavailable to this defendant, and had become a permanent resident of the state of Virginia. Thus, this petitioner's request, and this Court's order granting leave to this defendant to appear, on the Petition for Rehearing *En Banc*, pro se. Defendant's formal Pro Se Appearance was filed (See Exhibit-A, attached hereto).

Despite the foregoing, when on December 5, 1985, this Court entered its order denying this defendant's Petition for Rehearing *En Banc*, no copy, or other notice whatsoever, of this Court's order denying relief was provided to this defendant.

As a consequence, on December 21, 1985, this defendant departed the city of Chicago and travelled to the city of Alcoa, Tennessee, without any knowledge of the December 5th adverse action of this Court, to make funeral arrangements for one Sidney Strivision, age 91 years, the foster father of this defendant, who died on December 20, 1985, and who was buried in Alcoa, Tennessee, on December 27, 1985.

This defendant returned to Chicago in the late evening on Monday, December 30, 1985, to be advised by Robert S. Atkins, Esq., for the first time, on Tuesday, December 31, 1985, that this Court had denied this defendant's Petition for Rehearing *En Banc* 26 days earlier, on December 5, 1985. No copy or other notice of this Court's order denying the Petition for Rehearing *En Banc* was received by any lawyer associated with this defendant's appeal until on or about December 23, 1985.

As a result, this defendant has been deprived of more than fifty percent (50%) of the time provided by Rule, within which he would have had a right to file a petition for writ of certiorari with the clerk of the Supreme Court of the United States.

Mr. Robert S. Atkins, upon receiving notice of the issuance of this Court's mandate on December 23, 1985, without any obligation to do so, was kind enough to promptly prepare and file the Motion for Recall and Stay of Mandate, now under consideration by this Court.

Now, in further support of the request for recall and stay of mandate, this defendant respectfully advises the Court, that on Friday, January 3, 1986, this defendant learned, for the first time, that on December 30, 1985, a majority of the active judges of this Court, voted and ordered, Sua Sponte, rehearing *en banc*, in the cause of *United States of America, ex rel, Frank Teague v. Michael P. Lane, Director of Corrections*, et al., U.S. Court of Appeals cause No. 84-2474. The order of December 30, 1985, with dissenting Opinion by Judge Cudahy, concurred in by Senior Circuit Judge John W. Peck, is attached hereto as Exhibit-B.

U.S. ex rel Frank Teague (No. 84-2474), was docketed on behalf of a black state court defendant after, and was pending under consideration by a separate and different panel of this Court, for the full period of 16 months, during which this cause of *U.S. v. Tucker* (No. 83-1438), was pending and under advisement, after oral argument, by the panel that decided this case. Judge Coffey participated as a member of *both* panels; dissenting in *U.S. ex rel Teague* (84-2474).

Both *U.S. ex rel Frank Teague* (84-2474) and *U.S. v. Tucker* (83-1438) raised and vigorously argued, the exact same question (the sole issue in *U.S. ex rel Teague*):

> Whether the conscious striking and exclusion by the prosecution, of black persons, because of their race, from the jury that tried and convicted the black defendants in question, violated the provisions of the Sixth Amendment to the Constitution of the United States.

The determination of a majority of the appeals panel in *U.S. ex rel Teague* (No. 84-2474), that the conduct of the prosecution violated the defendant's Sixth Amendment

rights, and ordering a *new trial*, and the contrary and inconsistent determination of this panel in *U.S. v. Tucker* (83-1438), in which a professional statistical study and analysis, contained in an affidavit of record herein, concluded that the preemptory striking by the government of all prospective jurors who were black, was based solely on the fact of their race, creates a clear and undeniable "conflict between or among" the judges of the United States Court of Appeals for the 7th Circuit, as well as the acknowledged conflict between and among the several circuits of the United States; and which continuing national conflict was the subject of oral argument before the U.S. Supreme Court on Wednesday, December 11, 1985, in the case of *Baston v. Kentucky*, 105 S.Ct. 2111 (1985).

This continuing conflict, and national strain and pull upon the several federal circuit courts, as to this issue, and particularly the now documented conflict within the ranks of the judges of this Court, not only impact upon the legitimate rights of defendants in criminal cases, but strongly confuse and tend to undermine public confidence in the stability of the judicial process.

Propriety, consistency and stability of this Court's decisions, as well as fairness and equal protection of the law would seem to warrant recall and staying of the mandate in this cause; the vacating and setting aside of this Court's order of December 5, 1985, denying this defendant's Petition for Rehearing *En Banc*; consolidating this cause with the cause of *U.S. ex rel Frank Teague*, at least with respect to the issue of the conscious exclusion of black persons from trial jury service in each case on the basis of their race, and setting *both* causes No. 84-2474 and No. 83-1438 for rehearing *en banc* at a date convenient to this Court; or, in the alternative, recalling and staying the mandate issued herein and advancing the *effective date* of the order of December 5, 1985, so as to allow this defendant, who is not now represented by counsel, his full and lawful 60 days within which to prepare and timely file his Petition for Certiorari to the Supreme Court of the United States.

This defendant poses no threat to society, and is both anxious and determined to always be available to respond to the processes of this Court. Accordingly, no harm or injury will be visited upon the rights of any party to this cause if the relief requested in the initial submission by Mr. Atkins, and in this supplemental motion is granted.

WHEREFORE, defendant requests the entry of an order recalling and staying the mandate in this cause; vacating and setting aside the order of December 5, 1985, denying this defendant's Petition for Rehearing *En Banc*, consolidating this cause No. 83-1438 with cause No. 84-2474, at least as to the issue of conscious racially motivated jury exclusion, and setting both those causes, and that issue for rehearing *en banc*; or in the alternative, recalling and staying the mandate issued herein, and advancing the *effective date* of the order of December 5, 1985, to a current date so as to allow this defendant his full and lawful 60 days to prepare and timely file his Petition for Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted,

/s/ Robert L. Tucker
Pro Se
Defendant-Appellant
208 South LaSalle Street, #687
Chicago, Illinois 60604
(312) 332-2088

EXHIBIT-A

APPEARANCE AND CERTIFICATE OF INTEREST

ROBERT L. TUCKER, defendant herein, files the within appearance pro se, and furnishes the following list, in compliance with the provisions of Circuit Rule 5(a) and (b).

(1) PARTY REPRESENTED

Robert L. Tucker, defendant
208 South LaSalle Street, Suite 687
Chicago, Illinois 60604
(312) 332-2088

(2) ATTORNEYS AND LAW FIRMS REPRESENTING THIS DEFENDANT

Robert L. Tucker
Respectfully appears Pro Se

Respectfully submitted,

/s/ Robert L. Tucker
Defendant—Petitioner, Pro Se

Dated: September 30, 1985

[EXHIBIT-B omitted in printing—a copy of the Order of the Court of Appeals dated December 30, 1985 is set forth herein at pages D-1 to D-7.]

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 28, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 vs.

ROBERT L. TUCKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—Judge Charles P. Kocoras.

This matter comes before the court for its consideration upon the "EMERGENCY SUPPLEMENTAL MOTION TO RECALL AND STAY MANDATE; TO VACATE

* Hon. William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

ORDER OF DECEMBER 5, 1985; TO CONSOLIDATE CAUSES; OR FOR ALTERNATIVE RELIEF" filed herein on January 28, 1986.

On consideration thereof,

IT IS ORDERED that the issuance of this court's mandate is further STAYED to and including February 22, 1986.

IT IS FURTHER ORDERED that appellant's request for advancement of the "effective date" of the court's denial of rehearing is DENIED.

IT IS ALSO FURTHER ORDERED that appellant's request that the order denying rehearing be vacated and that this appeal be consolidated with *U.S. ex rel. Teague v. Lane*, Case No. 84-2474, is DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 7, 1985.

Before
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 vs.

ROBERT L. TUCKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—Judge Charles P. Kocoras.

This matter comes before the court for its consideration upon the "MOTION FOR LEAVE TO FILE AMICUS CURIAE STATEMENT" filed herein on November 1, 1985.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR LEAVE TO FILE AMICUS CURIAE STATEMENT" is DENIED.

APPENDIX H

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 19, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 vs.

ROBERT L. TUCKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—Judge Charles P. Kocoras.

This matter comes before the court for its consideration upon the "MOTION FOR LEAVE TO FILE AMICUS CURIAE STATEMENT" filed herein on November 12, 1985.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR LEAVE TO FILE AMICUS CURIAE STATEMENT" is DENIED.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 v.

ROBERT L. TUCKER,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253
Honorable Charles P. Kocoras, Judge Presiding.

MOTION FOR LEAVE TO FILE AMICUS CURIAE STATEMENT

As set forth in the attached statement, the Chicago Bar Association* requests leave to file the Amicus Curiae Statement in Support of Petition for Rehearing.

Respectfully submitted,
Chicago Bar Association
/s/ Richard J. Phelan
President
Chicago Bar Association

DATED: November 11, 1985

* On November 7, 1985, the Board of Managers, in an unprecedented action, voted unanimously to authorize filing of this Motion and attached Amicus Curiae Statement on behalf of the Bar Association and its President.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1438 v.

ROBERT L. TUCKER,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253
Honorable Charles P. Kocoras, Judge Presiding.

AMICUS CURIAE STATEMENT IN SUPPORT OF PETITION FOR REHEARING

The Chicago Bar Association ("CBA"), a not-for-profit corporation with more than 18,000 members, was organized in order to promote the due administration of justice and the public good. Because of the CBA's longstanding concern for the integrity of our lawyers and the judicial system, and the appearance of propriety in the administration of justice, the CBA seeks to file this amicus statement in support of a petiton for rehearing *en banc* filed by Robert Tucker. In support thereof, the CBA states the following:

1. The defendant, a respected member of the bar, was found guilty of criminal conduct in an admittedly "close case" in which error occurred in excluding evidence and in which numerous unusual procedures were followed.

2. The defendant's conviction was based on the testimony of a single government witness who was found by the Court to be "unreliable", "troubled", "evasive", "selective and self-justifying in his recollections" and "desperate for immunity".

3. The Court found that the trial court committed error in excluding from evidence a letter written by that same witness to a government attorney but concluded that the error was "harmless".

4. The trial judge refused to hold a pre-trial hearing on the issue of that witness' competency despite the witness' claim that he previously had suffered "brain damage."

5. The government submitted to the trial judge before trial, and without notice to or knowledge of defense counsel, derogatory reports about the defendant, a written statement of the government's case against defendant, along with exhibits and portions of grand jury testimony, and a statement concerning a certain grand jury witness who was excused from the grand jury and who became a witness at the trial.

6. The government used its pre-emptory challenges to exclude all black veniremen from the jury and supposedly justified its exclusion in an *ex parte* meeting with the trial court. The propriety of such exclusion is now at issue before the Supreme Court in *Batson v. Kentucky,* No. 84-6263.

The CBA submits that all of these matters considered together and in the context of a "close case" merit review *en banc,* especially where the defendant is a member of the bar whose reputation for honesty and integrity has never been questioned. Finally, in furthering the goal of proper and fair administration of justice and the appearance of fair play and justice, the CBA supports a rehear-

ing *en banc* and requests the Court to grant the Petition for Rehearing *en banc*.

Respectfully submitted,

Chicago Bar Association

/s/ Richard J. Phelan
President
Chicago Bar Association

/s/ Roseann Oliver
Chairman
Standing Committee on Litigation

Richard J. Phelan, Esq.
Roseann Oliver, Esq.
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